SYKT. PEGAWAI-PEGAWAI KERAJAAN PAHANG BEKERJASAMA KERANA JIMAT CERMAT & MEMINJAMKAN WANG BHD.

v.

WONG SENG CHAP, J.P.

HIGH COURT MALAYA, KUANTAN
SHAIK DAUD ISMAIL J
[CIVIL SUIT NO. 334 OF 1982]
31 DECEMBER 1983

CIVIL PROCEDURE: *Application to strike out defence - Whether reasonable cause of action disclosed.*

The defendant was granted a lease of certain premises of the plaintiff with an option for further extension for a period of 5 years upon the defendant giving notice six months before the expiration date of the defendant's intention to the lease. The defendant gave notice within the stipulated time, stating that he was desirous of extending the lease for a further period of 10 years. The plaintiff gave notice to the defendant to quit and deliver vacant possession of the premises for failure to give notice of intention to extend the lease. He then brought an action for vacant possession. The defence was that the defendant was entitled to further extension of the lease as proper notice had been given. The plaintiff applied under O. 18 r. 19(1)(a) of the Rules of the High Court 1980, for the defence to be struck off on the ground that it did not disclose a reasonable cause of action. He contended that the notice of intention to extend was bad *ab initio.*

Held:

There were a number of triable issues to be decided in the case, including that of the notice of intention to extend the lease, whether it was bad *ab initio* or not. Only in plain and obvious cases should an order for striking out be made under O. 18 r. 19(1)(a).

[Application dismissed.]

Cases referred to:

Drummond-Jackson v. B.A. [1970] 1 All ER 1094
T.R. Mahesuvary v. Lee Yin Shin & Anor. [1982] 1 MLJ 284

Legislation referred to:

Rules of the High Court 1980, O.18 r. 19(1)(a)

For the plaintiff - YM Raja Azhar; M/s. Raja Azhar & Co.
For the defendant - Balendran; M/s. Balendran, Chong & Bodi

JUDGMENT

Shaik Daud Ismail J:

This is an application by plaintiff under O. 18 r. 119(1)(a) of the Rules of the High Court 1980, that the defence filed be struck off as it does not disclose a reasonable cause of defence.

The plaintiff, a co-operative society are owners of premises No. 59-A & 61-A Jalan Mahkota, Kuantan. By a memorandum of lease dated 11 November 1971 executed between the plaintiff and defendant it was agreed *inter alia* that the plaintiff grant the defendant a lease of the said premises for an initial period of ten years from the date of the execution of lease and expiring on 31 August 1981 with an option for further extension upon the defendant giving

notice. The said lease contained a proviso that should the defendant desire to extend the said lease upon the expiry of the initial term of ten years, the defendant shall give notice to the plaintiff six months before the expiration date of his intention to extend the said lease. The plaintiff contends that the defendant failed to give such notice and consequently the plaintiff gave notice to the defendant to quit and deliver vacant possession of the said premises. The plaintiff in their statement of claim therefore claim vacant possession of the said premises and consequential reliefs. The gist of the defence is that due and proper notice had been given and as such the defendant is entitled to the extension as stipulated in the said lease. The lease envisaged a total period of 25 years; the first initial period of 10 years, followed by a period of 5 years and a final period of 10 years.

It is well established that the remedy of striking out a pleading, be it a statement of claim or defence, on an application under O. 18 r. 19(1) should only be resorted to in plain and obvious cases. The summary procedure under this rule should only be resorted to when it can be clearly seen that a claim or a defence is on the face of it obviously unsustainable and discloses no arguable case.

In *Drummond-Jackson v. B.A.* [1970] 1 All ER 1094, the plaintiff brought an action for libel against the authors and publishers of an article in the British Medical Journal. The defendants applied under O. 18 r. 19 of the Rules of the Supreme Court for an order for the statement of claim to be struck out as disclosing no reasonable cause of action. In considering the proper use of the powers conferred by the rule, Lord Pearson at p. 1101 said:

> Over a long period of years it has been firmly established by many authorities that the power to strike out a statement of claim as disclosing no reasonable cause of action is a summary power which should be exercised only in plain and obvious cases.

Further on he said:

> There was no departure from the principle that the order for striking out should only be made if it becomes plain and obvious that the claim or defence cannot succeed.

From the affidavit of the Chairman and Secretary of the plaintiff society, it is apparent to me that their basis for the application is solely on the wording of the option. They have nowhere denied that the option was given in time. It is their contention that the defendant failed to strictly adhere to the wording of the option as contained in Clause 2(vi) of the said lease. The said Clause 2(vi) reads as follows:

> Upon the request of the lessees in writing made to the lessors six (6) months before the expiry of this lease, to grant to the lessees a renewal thereof for a further period of five (5) years from the date of expiration upon the like rent terms and conditions as are in this lease contained.

The defendant in exercising the option as above stated in due time sent a letter dated 4 February 1981 and gave notice that he was desirous of extending the said lease for a further period of ten (10) years. It is the contention of the plaintiff that by mentioning the word and figure ten in the notice instead of the word and figure five as contained in Clause 2(vi) of the lease, the defendant has not properly exercised his option. The plaintiff contends that the option is bad *ab initio* and it cannot be corrected later even though given in due time. In support of this contention the learned Counsel for the plaintiff quoted the case of *T.R. Mahesuvary v. Lee Yin Shin & Anor.* [1982] 1 MLJ 284 in which it was held that a notice that is bad *ab initio* cannot be cured by a subsequent "corrective" notice, even when the second notice is given before the expiry of the time given by the first notice.

The question to be decided is whether the notice given by the defendant in the present case is bad *ab initio*. The defendant contends that the notice in the present case is not bad *ab initio* so long as the basic provision of the option has been complied with the figure five or ten should not matter. I agree with the defence contention that the notice in the present case is not bad *ab initio*. I am of the view that the basic provision of the option as contained in Clause 2(vi) of the lease is not the figure five but the time period within which it should be exercised. I feel that the defendant in giving the notice need not even mention the figure five or any other figure. He need only give a bare notice of his intention to renew the lease and the rest will be taken care of by the option itself as contained in Clause 2(vi). In that case the plaintiff will be automatically obliged to renew the lease for another five years. I am of the view that because of this the notice is not bad *ab initio*. Be that as it may, the question of whether the notice is good or bad is an arguable question which should be decided by a proper trial. The whole claim by the plaintiff stands or falls when that question is decided. I am satisfied that the defence has shown on this question of the notice that there is a triable issue. I am also satisfied that the defence has shown that there are other triable issues. One of such is whether there is a third floor to the premises as there seems to be a dispute on this and another question is whether there was a waiver on the part of the plaintiff. It would appear that after the so-called bad notice had been received the plaintiff did not take any steps to get vacant possession until 15 months later and for 13 months had received the rents without qualification.

It is my judgment that there are a number of triable issues to be decided in this case and it is not a case where it is plain and obvious that the case is uncontestable or unarguable so as to resort to O. 18 r. 19(1). In the event, I dismiss the application with costs.

Also found at [1984] 1 CLJ 387